IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1820

ASSOCIATED THIRD CLASS MAIL USERS, *Petitioner*,

v.

UNITED STATE POSTAL SERVICE, *Respondent*.

On Writ of *Certiorari* to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE NATIONAL MASS RETAILING INSTITUTE, *Amicus Curiae*

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The National Mass Retailing Institute supports the prayer of the petitioner, Associated Third Class Mail Users, for a writ of *certiorari* to review the judgment in this case of the United States Court of Appeals for the District of Columbia Circuit. Letters of consent by all parties to the filing of this brief pursuant to Rule 42 of the Court have been filed.

INTEREST OF *AMICUS CURIAE*

The National Mass Retailing Institute, Inc., ("NMRI") is a trade association of large retailers

whose purpose it is to protect, promote, foster and advance the general welfare and interest of the mass retailing business. NMRI appeared as *amicus curiae* in the instant case in the United States Court of Appeals for the District of Columbia Circuit. NMRI does not challenge the constitutionality of the postal monopoly, properly construed. NMRI, however, challenges interpretations of the private express statutes by the United States Postal Service which expand the word "letters" beyond its literal meaning to include ordinary wholly printed addressed advertisements, as well as other matter such as tape recordings, blueprints, and data processing tapes which clearly fall outside the commonly understood meaning of the term "letters". NMRI challenges these regulations because it believes that the cost of distributing addressed advertisements will be reduced if competition is permitted.

QUESTIONS PRESENTED

1. Whether an ordinary printed advertisement, by virtue of being addressed, becomes a "letter" within the meaning of 18 U.S.C. § 1696(a), a portion of the Private Express Statutes.

2. Whether the Postal Service has any authority, by interpretation of the Private Express Statutes, to override Congressional statutes delegating regulatory authority over certain subject matter to the ICC, the CAB and the FCC.

3. Whether the use of rulemaking authority by the Postal Service to increase its own revenues at the expense of potential private competitors deprives these potential competitors of property without due process.

STATEMENT OF THE CASE

The petition for *certiorari* of the Associated Third Class Mail Users ("ATCMU") gives this Court its first opportunity to interpret the criminal statutes whereby Congress in 1872 granted a limited statutory monopoly to the national post office.

On September 26, 1974, this case was initiated by the Associated Third Class Mail Users ("ATCMU") in the federal district court of the District of Columbia, invoking its jurisdiction under 28 U.S.C. § 1339 and 39 U.S.C. § 409(a). ATCMU sought a judicial declaration that wholly printed advertisements, addressed by affixing mailing labels, do not constitute "letters" within the scope of the postal monopoly and may be transmitted outside the postal system without exposing the sender to liability under the criminal laws.

On November 29, 1977, the District Court granted the Postal Service's motion for summary judgment and held that such advertisements are within the scope of the postal monopoly. 440 F.Supp. 1211 (Parker, J.). On March 9, 1979, the United States Court of Appeals for the District of Columbia Circuit affirmed by a 2-1 decision.[1]

The opinion of the court below is apparently founded upon two legal propositions. First, the Court of Appeals appears to endorse, with some hesitation, the District Court's conclusion that the postal monopoly encompasses not merely "letters," as described in the current criminal code, but somehow incorporates by inference the 1845 language of "letters . . . . or other

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[1] *Associated Third Class Mail Users* v. *United States Postal Service*, No. 78-1065, Slip Op. (U.S. App. D.C., March 9, 1979).

matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals." This proposition rests upon the premise that the 1872 Postal Act merely recodified, but did not contract, the postal monopoly which existed prior to the 1872 Act.[2]

The second legal proposition on which the Court of Appeals' opinion is grounded is that an item falling within the Postal Service's current administrative definition of the postal monopoly is thereby included within the scope of the criminal statutes which create the postal monopoly.[3]

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[2] The District Court held the change of the wording of the postal monopoly statutes in 1872:

> was part of a general recodification of the law in 1872 to weed out redundancy . . . . [T]he unheralded change in phrasing [by the 1872 Act] could only have been a simplification.

440 F. Supp. at 1214. The Court of Appeals cited the District Court's conclusions on this point with approval (although expressing some reservations in a footnote, Slip Opinion at 8 n.13):

> As Judge Parker pointed out . . . the 1872 Act was intended to reword and clarify the nation's postal laws *without substantive alteration*. . . . Absent some indication that Congress focused on the issue, we are reluctant to find in what purported to be a recodification a deliberate contraction of the postal monopoly. [Emphasis by the court, footnotes omitted.]

Slip Opinion at 7.

[3] The Court of Appeals held:

> We now turn to the ATCMU contention that the Postal Service definition of "letter" as "a message directed to a specific person or address and recorded in or on a tangible object" is arbitrary and contrary to common sense. . . . We simply conclude that the Postal Service has settled upon a reasonable criterion—the presence or absence of an address—and that its definition suffers from no more than the level of arbitrariness which is inevitable.

Slip Opinion at 12-13. The Court of Appeals also upheld the validity of the regulations in other respects. Although the court agreed the Postal Service's regulations defining the scope of the postal monopoly were "ambiguous and inconsistent" (Slip Opinion at 5-6), it concluded that they are nonetheless entitled to judicial deference. Slip Opinion at 12. The Court of Appeals also agreed with the District Court that the Postal Service was authorized to promulgate regulations which defined the scope of the postal monopoly prohibitions, notwithstanding the fact that the statutes being construed are criminal in nature and not part of the postal code. Slip Opinion at 3 n.5.

Meanwhile, encouraged by the broad holding in this case in the lower courts, the Postal Service has recently proposed a new, even broader, administrative definition of the word "letter" as used in the postal monopoly laws and cites the lower court holdings as support for its position.[4]

SUMMARY OF ARGUMENT

The last major revision of the Private Express Statutes occurred in 1872. At that time Congress amended the prior 1845 statute by deleting language which conferred a postal monopoly on "letters . . . or other

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[4] United States Postal Service, "Proposed Revisions in Comprehensive Standards for Permissible Private Carriage of Letters," 43 Fed. Reg. 60615 (Dec. 28, 1978). The publication of these proposed revisions, which generally expand the scope of the claimed monopoly, appears to have been prompted by the District Court's opinion in the present case. On January 10, 1978, the Deputy General Counsel of the Postal Service proposed the first draft of these revisions and noted: "with a victory in the ATCMU private express case under our belts, the time appears ripe to publish proposed revisions in our private express regulations." Memorandum from Roger P. Craig, Deputy General Counsel, United States Postal Service to C. Neil Benson, Chief Postal Inspector, USPS, and John F. Applegate, Assistant Postmaster General, Customer Service Department, USPS, dated January 10, 1978. (This memorandum was recently filed with the House Subcommittee on Postal Operations and Service during its current oversight hearings on the scope of the postal monopoly.)

matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals" and instead provided that the monopoly applied only to "letters."

The Postal Service has provided by regulation that, solely for the purposes of the Private Express Statutes,[5] the term "letter" means any "message directed to a specific person or address and recorded in or on a tangible object."

That broad definition, which applies to wholly printed advertisements (along with many other items), is much broader than Congress intended, and is inconsistent with the interpretation which the Post Office Department gave to the scope of its monopoly for many years.

Legislative history prior to the enactment of the 1872 statute indicates that the term letter was intended to apply to current and personal correspondence in writing.

This interpretation is also consistent with the contemporaneous interpretation of the term letter, as reflected in an 1873 opinion by the Post Office Department Solicitor, and by many other subsequent opinions and regulations.

It was not until 1974, with the benefit of 100 years of hindsight, that the Post Office Department clearly and unambiguously asserted the broad monopoly power at issue in this case. In fact, in the intervening years,

[5] See, e.g. U.S. Postal Service Publication 42, § 222.1 (1976): "Letters and letter packages refer to that class of mail for personal handwritten, typewritten, or recorded communications having the character of current correspondence."

Post Office officials frequently complained to the Congress that their monopoly power does not extend to third class items. This failure by the Postal Service (and its predecessor organizations) to assert broad control for so long a period is strong evidence that the broader powers now claimed did not and do not exist. The current assertion of monopoly power by the Postal Service is simply an administrative fiat—inconsistent with the intent of Congress—and therefore unlawful.

The Postal Service regulation is also unlawful because it usurps power granted by Congress to other federal agencies, specifically the ICC, the FCC, and the CAB. The Department of Justice has filed written comments with the Postal Service criticizing similar proposed regulations on this ground.

Under the regulations, items ranging from commercial papers, documents, and written instruments to audit media and business records, many of which are transported by common carrier subject to regulation by the ICC, are classified, by the Postal Service, as "letters." Likewise, the Postal Service regulations may interfere with CAB regulations liberalizing rules governing indirect air cargo carriers. Moreover, the regulations preclude competition in the supply of certain "facilities and services incidental to the electronic transmission of messages," a subject which Congress has delegated to the FCC for regulation.

This Court should grant *certiorari* to consider whether the Postal Service regulations improperly infringe upon the jurisdictional areas of other federal agencies.

Finally, the Postal Service has abused its rulemaking power by using that power in such a way as to

further its own financial interest at the expense of would-be competitors and users of the services of competitors in the private sector. If the Postal Service regulation is not overturned, these would-be private competitors face criminal sanctions if they attempt to provide delivery services for printed advertisements. This self-serving use of its rulemaking power by the Postal Service is inconsistent with recent decisions of this Court, holding that "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."

ARGUMENT

A. The Decisions Below Permit The Postal Service To Expand Its Jurisdiction Beyond The Bounds Of Its Statutory Authority

This case involves the validity of the Postal Service claim of monopoly over the carriage of substantially all materials which can be sent by third class mail. The Post Office has not always interpreted its statutory authority as being so expansive.

When it established the Post Office Department in 1789,[6] Congress restrained the private carriage of a limited range of articles from among those that were mailable. The scope of this statutory protection varied, however, from statute to statute, particularly during the

[6] Throughout this brief, the "*Post Office Department*" refers to the executive department which was created by the Act of September 22, 1789, ch. 16, 1 Stat. 70, and abolished by the Postal Reorganization Act, Pub. L. 91-375, 84 Stat. 719, 39 U.S.C. § 201 (1970). The "*Postal Service*" refers to the independent federal agency established by the Postal Reorganization Act of 1970. Finally, the "*Post Office*" will be used to refer to both postal organizations.

first three quarters of the nineteenth century.[7] The most recent substantive change in the scope of the postal monopoly statutes was by the Act of June 8, 1872, which revised and codified all of the postal laws of the United States. The gist of the 1872 Act, insofar as this case is concerned, (ch. 335, §§ 227-39, 17 Stat. 283, 311-12) was that, by its terms, it reduced the scope of the postal monopoly from "letters . . . or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals" as used in the 1845 statute, to simply "letters or packets."[8]

[7] The basic scope of the monopoly was changed on ten occasions, in the years 1792, 1794, 1825, 1827, 1836, 1838, 1845, 1852, 1864, and 1872. Act of February 20, 1792, ch. 7, § 14, 1 Stat. 236 (expanding scope of prohibition and fine); Act of May 8, 1794, ch. 23, § 14, 1 Stat. 360 (addition of specific prohibition against common carriers); Act of March 3, 1825, ch. 64, § 18, 4 Stat. 107 (clarification of restraints on common carriers, elimination of prohibition against private expresses); Act of March 2, 1827, ch. 61, § 3, 4 Stat. 238 (prohibition against establishment of foot or horse post); Act of July 2, 1836, ch. 270, § 42, 5 Stat. 89 (extension of monopoly to navigable waterways); Act of July 7, 1838, ch. 172, § 2, 5 Stat. 283 (extension of monopoly to railroads); Act of March 3, 1845, ch. 43, §§ 9, 10, 5 Stat. 735-36 (expansion of monopoly to all mailable matter, reinclusion of prohibition against private expresses); Act of August 31, 1852, ch. 113, § 8, 10 Stat. 141-42 (exception to monopoly for stamped letters); Act of March 25, 1864, ch. 40, § 7, 13 Stat. 37 (authorizing Postmaster General to suspend exception for stamped letters); Act of June 8, 1872, ch. 335, §§ 227-39, 17 Stat. 283, 311-12 (restricting the prohibition to the carriage of "letters"). *See*, G. L. Priest, "The History of the Postal Monopoly in the United States," 13 J. Law & Econ. 33 (1973).

[8] The criminal prohibitions in the 1872 postal code actually extend to the carriage of "letters and packets," providing:

> That no person shall establish any private express for the conveyance of letters or packets, or in any manner cause or provide for the conveyance of the same by regular trips or at stated periods, over any post route which is or may be

We have found no definitive legislative history to explain this crucial change in the wording of the monopoly statutes. Comment by Congressmen and postal officials at the time the 1872 law was enacted focused on several other revisions in the postal code, but was silent on the change in the postal monopoly.[9]

This lack of comment is explainable by prior legislative history which is quite explicit.

In 1863, the Post Office Department recommended a revision and codification of the postal laws. One recommended change concerned classification. The Post Office Department recommended that mail be divided into three classes.

> 1st, letters; 2d, regular printed matter; 3d miscellaneous matter . . .

Congress adopted this proposal.[10]

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established by law. . . . Act of June 8, 1872, ch. 335, § 228, 17 Stat. 283.

The term "packet," however, is an archaic word for a letter of four or more pages, and, therefore, it is correct to view the monopoly as extending only to "letters." *See, Williams* v. *Wells Fargo Company & Co. Express*, 177 F. 352 (8th Cir. 1910). The courts below and all parties to this litigation agree on this interpretation of the phrase "letters and packets."

[9] The legislative record of the enactment of the 1872 Postal Code contains no explanation of the intended scope of the postal monopoly. It was not mentioned in debate nor in any extant committee report. *See*, Cong. Globe, 41st Cong., 3d Sess., 30-37, 41-47, 83-86 (1870); Cong. Globe, 41st Cong., 3d Sess., 957-61 (1871); Cong. Globe, 42d Cong., 1st Sess., 15, 31, 42, 72, 3640-53, 3893, 4091 (1872).

[10] Act of March 3, 1863, ch. 71, § 19, 12 Stat. 701.

The Post Office Department also recommended changes in the Private Express Statutes. Specifically, it was proposed that the prohibition against private carriage "of any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail," be narrowed by adding the underscored language: "except newspapers, pamphlets, magazines, periodicals, *and other matter classed in this code as miscellaneous mail matter. . . .*[11] (emphasis added).

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[11] The complete text of the relevant provisions of the 1863 recommendations was as follows:

> § 47. Mailable matter is divided into three classes, namely: 1st, letters; 2d, regular printed matter; *3d miscellaneous matter.*
>
> § 48. The first class embraces all correspondence wholly or partly in writing, except that mentioned in the third class; the second class embraces all mailable matter exclusively in print, and regularly issued at stated times, without addition by writing, mark, or sign; *the third class embraces all other matter which is or may hereafter be by law declared mailable, embracing all pamphlets, occasional publications,* books, book manuscripts and proof-sheets, whether corrected or not; maps, *prints,* engravings, blanks, flexible patterns, samples, and sample cards; phonographic [sic] paper, letter envelopes, postal envelopes or wrappers; cards, paper, plain or ornamental; *photographic representations of different types;* seeds, cuttings, bulbs, roots and scions.
>
> § 169. It shall not be lawful for any person or persons to establish any private express or expresses for conveyance, nor in any manner to cause to be conveyed, or provide for the conveyance or transportation, by regular trips or at stated periods or intervals, from one city, town, or other place, to any other city, town or place in the United States, between, and from, and to, which cities, towns, or other places the United States mail is regularly transported under the authority of the Post Office Department, of any letters, packets, or packages of letters, or other matter properly transmittible (sic) in the United States mail, except newspapers, pamphlets, magazines, periodicals, *and other matter classed in this code as miscellaneous mail matter. . . .*

Post Office Department, "Revision of the Laws: Prepared by the Post Office Department for the Committee on the Post Office and Post Roads," 1863. (emphasis added).

Congress did not act on this proposal in 1863. However, the quoted language reflects the understanding of the Post Office Department that "letters " were separate and distinct from "miscellaneous mail matter" and that it was appropriate for the Post Office to assert monopoly privileges only over "letters."

This distinction between "letters" and other "miscellaneous mail" was, we submit, codified by Congress in 1872. Congress did this by conferring a postal monopoly over "letters," a term which the Post Office Department had already recognized as being narrowly defined.[12]

A similar narrow interpretation of the postal monopoly was adopted by the Post Office Department following enactment of the 1872 legislation. From the beginning lawyers for the Post Office Department prepared short legal opinions concerning many aspects of the postal laws. The first opinion concerning the scope of the postal monopoly was written only one year after the 1872 Act. In a general discussion of the purpose of the monopoly provisions, the Post Office Department lawyer declared:

> It was the purpose of the [Private Express Statutes] to prevent, by penal enactments, the transmission of *mailable matter of the first class (all correspondence wholly or partly in writing)* by express . . . (emphasis added).

1 Op. Sol. P.O.D. 36 (1873). The 1873 opinion, deferring to the statutory definition, uses the phrase "correspondence wholly or partly in writing" as equivalent to the statutory term "letters."

This early interpretation of the 1872 statute by the Post Office Department is particularly important in determining the scope of the postal monopoly which was intended by Congress. It is axiomatic that the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion . . ." is entitled to great weight by the courts in construing legislative intent. *Power Reactor Development Co.* v. *International Union of Electrical Radio and Machine Workers,* 367 U.S. 396, 408 (1961) (quoting *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294 (1933).) *Accord, Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). *See, FTC* v. *Mandel Bros., Inc.,* 359 U.S. 385, 391 (1959); *FHA* v. *The Darlington, Inc.,* 358 U.S. 84, 90 (1958).

Administrative regulations, legal opinions and actions in the four decades following the 1872 Act were fully consistent with the Postal Solicitor's narrow 1873 Opinion.[13] For example, *Postal Laws and Regulations* issued in 1893 stated:

> It will be observed that the Congress has not yet, by statute, extended the [postal] monopoly to sec-

[12] Further support for this interpretation is found in an 1882 report of the House Committee on Post Office and Post Roads. That report, after distinguishing between letters on the one hand, and "transient newspapers, circulars, and other printed matter," as well as "third and fourth class matter," went on to explain:

> Following the example of the oldest and best established governments in the world, the founders of the Constitution delegated to the government a monopoly in the carriage of letters. . . . Competition by private carriers is, however, allowed for all the other classes of matter permitted to go in the mails.

House Rep. 47-1816, 47th Cong., 2d Sess. (1882), p. 8.

[13] Postal Solicitor's Opinions during this period make clear that the postal monopoly was interpreted to extend only to "letters," *i.e.*, materials of the "first-class" under the 1872 Postal Act. Indeed, P.O.D. Solicitors were careful to point out that the monopoly

ond, third, or fourth class matter, although admitted to the mails. [Sec. 674] [14]

Congress never has.

However, beginning in the second decade of this century, Postal Solicitors began to abandon their traditional view of the limited scope of the postal monopoly and to expand their interpretation of the word "letters." [15] In 1916, the Postal Solicitor issued three brief opinions asserting that letters included certain wholly printed matter including advertisements, without making a distinction between addressed and unaddressed matter.[16] These three opinions, contradicted by prior and subsequent interpretations, are the only explicit administrative precedents cited by the Postal Service, prior to the regulations issued in 1974, for the monopoly asserted in this case.

Although some of the Postal Solicitor's Opinions after 1910 can be read to assert a claim of monopoly over the carriage of almost anything, postal officials were far less expansive in testimony to Congress during this period. In 1911, for example, in Senate hearings on the issue of whether the Post Office should monopolize parcel post, the Second Assistant Postmaster General, in sworn testimony, admitted that "the Government monopolizes the carriage of first-class mail, but has never assumed a monopoly of any other class." [17] Subsequently, in the depression year of 1930, the Postmaster General was faced with a radically declining mail volume and a desperate need for revenues. In testifying to Congress in support of an increase in

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did not include other matters, such as postal cards [2 Op. Sol. P.O.D. 40 (1885); 2 Op. Sol. P.O.D. 453 (1887)] and commercial papers [3 Op. Sol. P.O.D. 211 (1898); *see*, 2 Op. Sol. P.O.D. 2 (1885); 5 Op. Sol. P.O.D. 193 (1909). *But cf.* 3 Op. Sol. 359 (1902)] even though these were made "first class" by the new classification scheme adopted in the Postal Act of March 3, 1879, ch. 180, § 8, 20 Stat. 355.

In the 1902 edition of the *Postal Laws and Regulations*, the administrative description of the postal monopoly was reworded to avoid any implication that the postal monopoly extended to all first class matters:

> The Congress . . . has vested in the Post Office Department an absolute monopoly of the transportation of letters and packets . . . [T]he Government monopoly does not extend to all matter admitted to the mails but only letters. P.O.D., *Postal Laws and Regulations*, § 1136 (1902 ed.).

A 1909 P.O.D. Solicitor's Opinion makes clear that this reformulation of the postal regulation did not imply any expansion of the administrative interpretation of the postal monopoly. In advising a U.S. Attorney on the scope of the monopoly, P.O.D. Solicitor Goodwin wrote:

> *As to what is a "letter," it has* never, so far as I have been able to learn, *been defined other than the common acceptation of the term. As to whether reports, invoices, etc., would constitute "letters"* within the meaning of the statute, *it would seem to me depends somewhat upon the circumstances of each case.* If they partake of the nature of *personal correspondence*, the conveying of written information from one to another, I am inclined to think that they should be construed as coming within the definition of "letters." However, this question is not free from doubt, and as *the question is still an open one*, so far as I am advised, I should be glad to see it raised in this case. . . . 5 Op. Sol. P.O.D. 193 (1909) (emphasis added).

[14] See also, *Postal Laws and Regulations*, 1879 ed., § 555; id. (1887 ed.) § 706.

[15] *See, e.g.*, 7 Op. Sol. 131 (1921) (samples of merchandise from Montgomery Ward).

[16] 6 Ops. Sol. P.O.D. 372 (1916); Id. 397; Id. 453.

[17] Testimony of Hon. Joseph Stewart, Hearings on S. Res. 56 before The Subcommittee on Parcel Post of the Senate Committee on Post Offices and Post Roads, 62d Cong., 1st Sess., Vol. 1, at 139 (1911).

first-class postage, he explained why an increase was not being requested in the other postage rates:

> As you understand, we have a monopoly only of first-class mail. This is the trouble. If Congress gave the Post Office Department a monopoly of the first, second, third, and fourth class, then we would get all the business, but *we have a monopoly of only sealed-letter mail. We have to come into competition with every sort of carrier on everything else.*[18] (emphasis added).

This long history of reluctance by the Postal Service (and its predecessor) to assert monopoly power over items other than first-class mail is highly significant. As this Court said in *FTC* v. *Bunte Bros., Inc.,* 312 U.S. 349, 352 (1941):

> Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.[19]

In 1974, the Postal Service adopted its most expansive definition of "letter" (until the positions adopted by it below). The 1974 regulations declare that the word "letter" means any "message directed to a specific person or address and recorded in or on a tangible object." 39 C.F.R. § 310.1 (1978). This 1974 administrative definition concededly includes addressed advertising brochures which are the subject matter of this case. In addition, it covers a great deal more. The Postal Service claims a monopoly over payroll checks,[20] data processing tapes, cards, and programs,[21] intra-company memoranda,[22] plastic credit cards,[23] and the hardcopy of electronically transmitted messages.[24] All of the foregoing, according to the Postal Service, are "letters" (but only for the purposes of the Private Express Statutes).

The Public Counsel of the Postal Rate Commission has observed that Postal Service's current regulations represent an expansion of its prior claim of monopoly.[25]

[18] Hearings on H.R. 14246, the Post Office Appropriation Bill for 1932, before the Subcommittee of the House Committee on Appropriations, 71st Cong., 3d Sess., at 227-28 (1930).

[19] Citing *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294 (1933).

[20] United States Postal Service, Private Express Statutes (PES) letter 75-1 (1975).

[21] United States Postal Service, Private Express Statutes (PES) letters 75-11 (1975) and 78-11 (1978).

[22] United States Postal Service, Private Express Statutes (PES) letter 74-15 (1974).

[23] United States Postal Service, Private Express Statutes (PES) letter 76-8 (1976).

[24] United States Postal Service, Private Express Statutes (PES) letter 78-14 (1978).

[25] The Public Counsel of the Postal Rate Commission commented on the proposed version of the current regulations:

> [T]he Postal Service proposes to expand the legal basis of its statutory monopoly. The proposed definition of the word "letter" would expand the scope of the monopoly to include the following materials not formerly letters [listing fourteen items including "catalogs"]. . . . It accordingly appears that the Postal Service wishes to expand the legal basis of its monopoly over the carriage of "letters" to nearly all mailable matter except parcels and unaddressed circulars.

"Legal Memorandum of Assistant General Counsel, Litigation Division, Concerning the Role of the Postal Rate Commission in

Further, the fact that the Postal Service has been expanding its claim of monopoly was recently emphasized by a former General Counsel of the Post Office Department:

> [*T*]*he fact of the matter is that there has been an expansion in the basic definition of what constitutes a letter.* It is clear the post office is presently maintaining that materials, which *no one in their right mind would have ever believed come close to the definition of a letter,* are letters, and it is causing a lot of trouble.[26] (emphasis added).

This Court has firmly declared that a federal agency may not expand the scope of its jurisdiction beyond the bounds of its statute, especially where, as here, to do so is to expand the scope of a penalty. *See, International Brotherhood of Teamsters* v. *Daniel,* 58 L.Ed.2d 808, 820 and n. 20 (U.S. 1979); *SEC* v. *Sloan,* 436 U.S. 103, 117-119 (1978); *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275, 287 and n. 5 (1978); *United States* v. *Larionoff,* 431 U.S. 864, 873, n. 12 (1977); *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 212-14 (1976); *Dixon* v. *United States,* 381 U.S. 68, 74 (1965).

Adamo Wrecking Co. is particularly pertinent because it involved the interpretation of a statute which, from the Government's standpoint, was admittedly ambiguous and involved criminal sanctions. This Court struck down the EPA interpretation, reasoning:

> This lack of specific attention to the statutory authorization is especially important in light of this Court's pronouncement in *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140, 89 L.Ed. 124, 65 S. Ct. 161 (1944), that one factor to be considered in giving weight to an administrative ruling is "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

434 U.S. 275, 287, n. 5.

We respectfully submit that the Postal Service regulation is not grounded upon "specific attention to the statutory authorization" and certainly there has been no "thoroughness evident in its consideration," nor has there been "consistency with earlier and later pronouncements." There is no way that the Postal Service could have acquired a monopoly over the majority of third-class mail except by administrative fiat—a fiat which simply exceeds the scope of its statutory authority. The upholding of the claim of monopoly by the court below, to the extent it was grounded in the validity of the Postal Service's regulations, thus directly conflicts with a long line of decisions of this Court that a federal agency does not have the power to expand its statutory authority.

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the Exercise of the Legal Controls Over the Private Carriage of Mail and the Postal Monopoly," at 1-2 (1973). The proceeding for which this memorandum was submitted was dismissed by the Postal Rate Commission for lack of jurisdiction.

[26] Remarks of Timothy J. May, former General Counsel, Post Office Department, at a conference on "Postal Service Issues," American Enterprise Institute, October 13, 1978, Transcript, at 230.

B. The Court Should Grant The Petition For *Certiorari* To Resolve Important And Fundamental Jurisdictional Conflicts Among The Postal Service, The ICC, The CAB, And The FCC

The gist of the holding of the court below appears to be a determination that the postal monopoly extends at least as far as that claimed in the Postal Service's 1974 regulations and perhaps to all addressed matter transmittable in the mail.

This endorsement by the D. C. Circuit of the broad claims of the Postal Service with respect to the 1974 regulations will subject the public to confusing and conflicting directions from several federal agencies: the Postal Service, the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Communications Commission.

The Interstate Commerce Commission is charged generally with the duty to regulate "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce . . . ." (49 U.S.C. § 304(a)(1); § 303 (a)(14).) Pursuant to this duty the ICC has issued certificates and permits to carriers authorizing the transportation of commercial papers, documents, written instruments, audit media, and business records.[27]

In its evaluation of the Postal Service's 1974 Private Express Statute regulations (then in proposed form), the ICC commented:

> If the proposed regulations go into effect, "letters" would include checks and other commercial papers, legal papers and documents, matters sent for auditing or preparation of bills, and matter sent for filing or storage. As a result, specified materials, now transported by for-hire carriers, would fall squarely within the prohibitions of the Private Express Statute.
>
> * * * *
>
> Absent extensive and thorough justification, the proposed [now current] regulations and the concomitant expansion of the Postal Service's already existing monopoly, appear to be arbitrary, capricious, and unwarranted. In light of the foregoing, the Interstate Commerce Commission opposes the proposed regulations to the extent that they create a regulatory overlap which infringes upon the Commission's jurisdiction and jeopardizes the constitutional rights of the for-hire carriers which it regulates.[28]

The U.S. Department of Justice has also remarked upon the potential for interagency conflict arising from the Postal Service's ever expanding claims of a statutory monopoly:

> *The potential for interagency conflicts implicit in the Postal Service's apparent policy of simply overriding other regulatory systems is relatively clear.* The Civil Aeronautics Board, for example, just issued proposed new regulations greatly liberalizing regulations governing indirect air cargo carriers—freight forwarders—under authority of recent legislation including the Air Cargo and Airline Deregulation Acts . . . . The purpose of these statutes is to sharply reduce the level and intensity of Federal regulation of air carriers and freight forwarders, and thus afford consumers a

[27] Interstate Commerce Commission, Letter from Arthur J. Cerra, Acting General Counsel, Interstate Commerce Commission, to Louis A. Cox, General Counsel, United States Postal Service, dated August 23, 1973.

[28] *Id.*

> wider variety of competing service options. Yet under the . . . Postal Service regulations, the ability of consumers to use these firms to ship documents and other materials that may be denominated "letters" could be adversely affected.[29] (emphasis added).

The Department of Justice has also expressed concern about the expansion of the Postal Service monopoly into areas regulated by the ICC and the FCC.[30]

The conflict with communications regulation arises from the Federal Communications Commission's statutory jurisdiction over "facilities and services incidental to the electronic transmission of messages." 47 U.S.C. § 153 (1970).

In United States Postal Service Private Express Statutes ("PES") Letter 78-14 (July 3, 1978), the Postal Service conceded that it had no jurisdiction over the electronic transmission of information over telephone lines. However, the Postal Service ruled that "carriage of . . . documents" to a company engaged in the business of transmitting facsimiles of documents over telephone lines did constitute the carriage of "letters," within the meaning of Postal Service regulations, as was "the delivery of the facsimile

[29] U.S. Department of Justice, "Comments of the United States Department of Justice, In the matter of Amendments to 39 C.F.R. Parts 310 and 320: Proposed Revisions in the Comprehensive Standards for Permissible Private Carriage of Letters," at 64-65 (March 13, 1979) (emphasis added). While the comments quoted were in response to new regulations proposed in 1978, the proposed regulations are identical to current regulations insofar as the quoted passage is concerned.

[30] *Id.*

documents to the addressees after transmissions . . . ." According to the Postal Service, both actions were unlawful (unless the private carrier paid the prescribed postage to the Postal Service).

Reacting to these claims, the FCC has stated, in tones echoing those of the ICC:

> [I]t is the FCC's position that Congress has excluded all aspects of the telecommunications services, including physical delivery . . . . [T]he proposal to subject such physical delivery to the Private Express Statutes is beyond the jurisdiction of the Postal Service.[31]

Thus, the opinion of the court below, which uncritically accepts the Postal Service's expansive administrative view of its own monopoly, raises fundamental jurisdiction conflicts between the Postal Service on the one hand, and the ICC, CAB, and FCC, on the other.

We respectfully submit that this Court should grant *certiorari* in the instant case to resolve these jurisdictional conflicts or, at the very least, to interpret the Postal Statutes in a way which harmonizes the regulatory schemes.

Where such jurisdictional conflicts exist between agencies, it may be especially appropriate for this court to ensure that the balance of regulatory authority has been properly maintained and that one agency, unilaterally issuing regulations, has not usurped pow-

[31] Letter from Robert R. Bruce, General Counsel, Federal Communications Commission to Louis A. Cox, General Counsel, United States Postal Service, dated March 12, 1979, p. 7.

ers appropriately delegated to other administrative bodies.[32]

C. The Use Of Rulemaking Authority By The Postal Service To Increase Its Own Revenues Through A Broadened Administrative Interpretation Of A Criminal Statute Contravenes Recent Decisions Of This Court Interpreting The Due Process Clause Of The Constitution

The Postal Service regulations which are the subject of this litigation have a direct and obvious impact on the income of the Postal Service, and on the income of its potential competitors. If, as the Postal Service asserts, it enjoys monopoly power over the delivery of second and third class mail, the Postal Service will realize all of the income from performance of this function in the United States, and will face no competitive pressures either with respect to price or quality of service.

The Postal Service is well aware of the value of this monopoly, as reflected in the following testimony, given before the Congress in 1930 by the Postmaster General:

> As you understand, we have a monopoly only of first-class mail. That is the trouble. If Congress gave the Post Office Department a monopoly of the first, second, third, and fourth class, then we would get all the business, but we have a monopoly of only sealed-letter mail. We have to come into competition with every sort of carrier on everything else.[33]

[32] See generally, *Udall* v. *FPC*, 387 U.S. 428 (1967) where this Court granted *certiorari* to consider whether the FPC, in awarding a license to construct a hydroelectric power plant to a consortium of private power companies, had failed to properly take account of claims by the Department of Interior that the project should be performed by federal development in accordance with Interior's responsibility for the protection and conservation of fisheries.

As indicated above, the Congressional Statute (18 U.S.C. § 1696) prohibits the private conveyance only of "letters or packets." In 1974, the Postal Service amended its definition of that term to include any "message directed to a specific person or address and recorded in or on a tangible object." (39 C.F.R. § 310.1(a)). In 1978, the Postal Service proposed regulations to extend its monopoly still further by providing that public advertisements would be characterized as letters if they are delivered according to a "selective delivery plan." (43 *Fed. Reg.* 60615 (1978)).

The exact scope of the monopoly conferred by Congress in its 1872 statute is of critical importance both to the Postal Service and to those private American businessmen who would like to compete with the Postal Service if it is lawful to do so. However, it is the Postal Service, through the exercise of rulemaking, which has determined that the Congressional grant of postal monopoly is to be interpreted in an all encompassing manner, to the detriment of the Postal Service's potential competitors. The fact that the Postal Service has exercised rulemaking in its own self-interest raises serious questions of due process which this Court should address.

[33] Hearings on H.R. 14246, the Post Office Appropriations Bill for 1932, before a Subcommittee of the House Committee on Appropriations, 71st Cong., 3d Sess., at 227-28 (1930).

A similar situation was considered by the Court in *Gibson* v. *Berryhill,* 411 U.S. 564 (1973). In that case, the Alabama legislature repealed a statute which expressly permitted the practice of optometry by individuals employed by business corporations. A complaint was then filed by the Alabama Optometric Association, a professional organization whose membership was limited to independent practitioners of optometry, against duly licensed optometrists who were employees of Lee Optical Company. The complaint was filed with the Alabama Board of Optometry, requesting revocation of the licenses of the named individuals. Under Alabama law, the Board had authority to issue, suspend and revoke licenses for the practice of optometry.

Suit was brought by the employee-optometrists before a three-judge Federal District Court, which granted an injunction prohibiting the Board from holding hearings or suspending the licenses of the employee-optometrists. On appeal, this Court unanimously upheld the District Court decision.[34]

The Board of Optometry was composed solely of optometrists engaged in private practice. Therefore, suspension of the licenses of employee-optometrists would "possibly redound to the personal benefit of members of the Board." In upholding the District Court opinion, this Court stated:

[34] The case was remanded to the District Court, however, to enable that court to consider whether a related decision of the Alabama Supreme Court was adequate to protect the rights of the employee-optometrists.

> It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.

411 U.S. at 579.

The situation in *Berryhill* and the Postal Service's rulemaking display instructive similarities. In each case, an organization with regulatory authority attempted to pass on a matter in which it was not disinterested. In each case, the monetary well-being of other persons was adversely affected. In *Berryhill,* this Court upheld a lower court ruling that:

> To require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is the right to practice their professions, without due process of law. . . .

411 U.S. at 571.

Comparable injury and comparable loss of due process results to all those who would like to engage in the business of delivering public advertisements and other matter which, if mailed, would constitute second and third class mail but cannot do so because of the self-serving regulations of the Postal Service.

The due process considerations become even more significant where, as here, criminal sanctions may be imposed. In *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972), this Court held that it was a denial of due process for traffic offenses to be tried by the village mayor. It was reasoned that revenue from the traffic offenses was an important source of revenue to Monroeville. Therefore, it would be virtually impossible for the

mayor, who had executive fiscal responsibilities to the village, to be impartial in ruling on traffic cases, even though the mayor had no personal financial stake in the outcome of the trials. The test in *Ward* was whether an average man would face a possible temptation. (409 U.S. at 60.)

This Court should grant *certiorari* to consider whether the decision in the lower court in this case is consistent with this Court's opinions in *Berryhill* and *Ward*.

CONCLUSION

For the foregoing reasons, the petition of Associated Third Class Mail Users for a writ of *certiorari* to review the judgment below of the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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